IN THE

Supreme Court of the United States

October Term, 1978

No. 78-62

NORDBY SUPPLY COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Nordby Supply Company, petitions for Writ of Certiorari to the Ninth Circuit Court of Appeals, certifying for review the decision of that court entered on the 10th day of April, 1978, in the case of *Nordby Supply Company v. United States of America*, Cause No. 77-2059.

A.

LOWER COURT DECISIONS

(1) United States District Court for the Western District of Washington, Cause C 75-145S, filed March 5, 1975, in which Nordby Supply sought refund of excise taxes paid under protest in the amount of $3,392.94, assessed by the

United States of America under the provisions of Internal Revenue Code §4161(a), decisions as follows:

(a) Order, filed January 19, 1976, in effect granting partial summary judgment as a matter of law in favor of Nordby on its claim for refund, reserving for later determination the question of the amount of refund; entered on the basis of Stipulated Facts (Appendix E, pp. A-11 - A-12); and

(b) Order Denying Motion To Set Aside Order Of January 19, 1976; entered April 2, 1976 (Appendix D, pp. A-8 - A-10); and

(c) Findings Of Fact, Conclusions Of Law, And Judgment, entered January 25, 1977; based upon Stipulated Facts, ordering a refund to Nordby Supply Company of 80% of the excise taxes paid ($2,714.25), upon a stipulation by the parties that 80% of the artificial lures upon which the excise tax was based were sold for commercial fishing purposes (Appendix B and C, pp. A-4 - A-7);

(2) The United States Court of Appeals for the Ninth Circuit, Cause No. 77-2059, decisions as follows:

(a) Opinion, entered April 10, 1978, reversing the district court, and remanding for entry of Judgment of Dismissal of the refund claim (Appendix A, pp. A-1 - A-3).

(3) None of the above opinions have been reported as of this time, and all are appended to this Petition.

B.

GROUNDS UPON WHICH JURISDICTION INVOKED

(1) Review is sought of the opinion of the Ninth Circuit Court of Appeals in Cause No. 77-2059, filed April 10, 1978 (A-2 above; Appendix A, pp. A-1 - A-3).

(2) No rehearing was sought of the above opinion; no extensions of time have been granted.

(3) 28 U.S.C. §1254(1), confers jurisdiction upon this court for review by certiorari of decisions of the court of appeals of the United States.

C.

QUESTION PRESENTED FOR REVIEW

Does Section 4161(a) of the Internal Revenue Code of 1954, 26 U.S.C. §4161(a), impose an excise tax upon artificial fishing lures purchased for commercial fishing purposes; or, is that section limited to taxation of such lures as are purchased for sport and/or recreational use only?

D.

STATUTES INVOLVED

(Appendix, Pages A-18 - A-23)

(1) Current law—1974 Internal Revenue Code, §4161 (a), 26 U.S.C. §4161(a), as amended, October 25, 1972, Pub. L. 92-558, Title II, §201(a), 86 Stat. 1173, set forth below:

> 26 U.S.C., Sec. 4161(a) RODS, CREELS, ETC.—There is hereby imposed upon the sale of fishing rods, creels, reels, and artificial lures, baits, and flies (including parts or accessories of such articles sold on or in connection therewith, or with the sale thereof) by the manufacturer, producer, or importer a tax equivalent to 10 percent of the price for which so sold.
>
> (b)Not applicable.

(2) Prior law—1939 Internal Revenue Code, Sec. 3406(a)(1), added September 20, 1941, effective October 1, 1941, Chapter 412, Title V, §551, 55 Stat. 716; revised,

August 16, 1954, Chapter 736, 68A Stat. 489; enacted in present form June 21, 1965, Pub. L 89-44, Title II, §205(a), 79 Stat. 140 (prior law quoted in Appendix).

E.

STATEMENT OF FACTS MATERIAL TO REVIEW

The facts are stipulated. (See Appendix F and G, pp. A-13 - A-17). Nordby Supply Company is a distributor of marine and fishing gear, primarily to commercial fishermen. It is headquartered in Seattle, Washington. Incident to this business it imports and sells to retailers for resale (or occasionally on a direct sales basis) artificial fishing lures used in commercial trolling.

It is stipulated that, for the period in question, 80% of such artificial lures were sold directly to commercial fishermen for commercial fishing purposes (Appendix, A-14 ¶ 6). The remaining 20% were sold for sport or recreational uses, or could not be accounted for. To repeat, it was *stipulated* by the parties in the district court that 80% of the lures were purchased for commercial use during the tax audit period which resulted in the levy which is at issue in this suit.

For the tax years in question, Nordby did not collect or pay over the 10% excise tax levied by I.R.C. 4161(a). If it had done so, $3,392.94 would have been the tax owing sought in the District Court below).

F.

BASIS FOR INITIAL FEDERAL JURISDICTION

28 U.S.C. §1346(a)(1); provides that all claims for refund of taxes paid to the United States must be filed in the United States district court.

G.

AMPLIFIED REASONS FOR GRANT OF CERTIORARI

The sole question is one of fundamental federal tax law—does I.R.C. 4161(a) tax commercial artificial fishing lures? The question has been erroneously decided in the Ninth Circuit Court of Appeals and will have, therefore, a harmful impact on commercial fishermen throughout the country who will pay a tax on articles never intended to be taxed in the first place, and not specifically included in the statute in question. Moreover, distributors and manufacturers of these items will, for the first time, be assessed this excise tax on their products, notwithstanding that the statute never was intended to tax commercial gear, and does not clearly do so on its face.

The Ninth Circuit Court of Appeals was wrong in its decision in this Cause, because:

(1) The decision is contrary to its own prior decisions on the same statute found in *Commerce Pacific, Inc. v. United States,* 278 F.2d 651, 653 (9th Cir. 1960), wherein the court held that the statute applied only to recreational and sporting goods, and stated that:

> "Recreational Equipment" and "Sporting Goods" connote equipment and goods generally *used* in recreation, pastimes, games, diversions and amusements.

(Emphasis supplied).

(2) The decision is contrary to the Treasury Department Rulings and Regulations interpreting the present statute and its antecedents; for example:

(a) Rev. Rul. 60-225 limits application of the statute, by definition, to "certain sporting goods," by stating that:

> The Internal Revenue Service has been asked whether the manufacturer's excise tax on *certain sporting goods*, imposed by Sec. 4161 of the Internal Revenue Code of 1954, applies to the manufacturer's sales of the articles described below.

(Emphasis supplied).

(b) Rev. Rul. 54-320 is to the same effect:

> Advice is requested whether tax on *sporting goods* imposed by Sec. 3406(a)(1) of the Internal Revenue Code. . .

(Emphasis supplied).

(c) Rev. Rul. 57-472 defines the scope of the statute in the following language:

> Sec. 4161 of the Internal Revenue Code of 1954 imposes a tax upon the sale by the manufacturer, producer, or importer of certain enumerated *articles of sporting goods*, including in each case parts or accessories of such articles sold on or in connection therewith, or with the sale thereof.

(Emphasis supplied).

(d) Internal Revenue Service regulations, Title 26, C.F.R. 48.4161(a)-1, specifically limit application of the tax to items used in "the sport of fishing;" *e.g.*,

> The tax applies only to those items of fishing equipment specified in section 4161(a) and this paragraph. Therefore, other items of fishing equipment, such as fishing nets, lines, hooks, sinkers, gaffs, etc., are not subject to the tax. Furthermore, the tax applies only to those specified articles of fishing equipment *that are designed or constructed for use in the sport of fishing.*

(Emphasis supplied).

Moreover, the Service has specifically limited the application of this very statute as it applies to fishing creels,

excluding those creels that are "primarily designed for use in the commercial fishing industry;" 26 C.F.R. 48.4161(a)-2(b)

> Fishing creels. The term 'fishing creels' includes all portable containers, of whatever material made, that are designed for storing and carrying fish from the time they are caught until such time as they are removed from the container for consumption or preservation. *The term does not include any article primarily designed for use in the commercial fishing industry,* . . .

(Emphasis supplied).

"Creels" are in no way treated differently by the statute itself from other items of fishing gear, including artificial lures.

(e) The decision of the Ninth Circuit Court of Appeals is inconsistent with legislative history dating back to the enactment of the excise tax statute as part of a comprehensive tax levied upon "sporting goods," 55 Stat. 716; and also inconsistent with current legislative history as expressed in House Report No. 433, "Excise Tax Reduction Act of 1965", May 28, 1965, 89th Congress, First Session, pp. 25-26, U.S. Code and Administrative News, 89th Congress, First Session, 1965, Volume 1, pp. 1671-2. In this report it is stated that the purpose of the Act is to eliminate all of the excise taxes on sporting goods imposed by I.R.C. 4161(a), except the tax on sport fishing equipment, for which the revenues will be devoted exclusively to federal financing of fish restoration and management programs "having a material value for sport and recreation".

H.
CONCLUSION

The circuit court decision in this case is based upon the court's determination as to the "administrative difficulties" which it forsees would be encountered by limiting the application of I.R.C. 4161(a) to sport and recreational gear only (Opinion, Appendix p. A-3). This decision is reached in the face of clear legislative and administrative history and rulings to the contrary for over a period of 35 years.

Questions of the "great and unnecessary difficulties in tax collection" (Circuit Court Opinion, p. 4, Appendix p. A-3) allegedly raised by limiting the statute to its proper scope, are for the legislative and administrative branches of government to resolve—not the courts. The circuit court has overstepped its bounds in basing its decision upon policy and administrative considerations outside the accepted and usual bounds of judicial review of taxing statutes and should be reversed for doing so.

Taxing statutes are not to be extended by implication beyond the clear import of the language used, and all doubts are to be resolved against the government and in favor of the taxpayer in such cases. *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 93-4, 55 S. Ct. 50, 54, 79 L. Ed. 211, 217-8 (1934).

Certiorari should be granted to correct a fundamental error of federal tax law which should be settled by this court.

Respectfully submitted,

CHARLES E. WATTS
RUTHFORD, LIND,
VAN VALIN & WATTS
Attorneys for Petitioner

LOWER COURT DECISIONS AND FACT STIPULATIONS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORDBY SUPPLY COMPANY, *Appellee,* v. UNITED STATES OF AMERICA, *Appellant.*	No. 77-2059 Filed April 10, 1973 EMIL L. MELFI, JR. Clerk, U.S. Court of Appeals

OPINION

Appeal from the United States District Court
for the Western District of Washington

Before: BROWNING, GOODWIN, and KENNEDY,
Circuit Judges.

PER CURIAM:

The United States appeals from a judgment in favor of the Nordby Supply Co. (Nordby), finding Nordby entitled to a refund of $2,714.25 for taxes paid. We reverse and remand.

Nordby imported and sold fishing lures under the trade name "Husky". The lures were packaged without hooks in groups of ten. Each package was marked "Designed and Sold for Commercial Fishing Only". In all other respects, the lures were identical to lures used in recreational fishing. Commercial fishermen purchased 80% of these lures.

Nordby paid the excise tax imposed on importers and manufacturers of fishing lures under Int. Rev. Code § 4161(a), and sued for a refund. The district court held that the tax applied to sport fishing equipment only, and not to commercial fishing equipment, and awarded Nordby a refund of 80% of the tax paid.

The language of § 4161(a) does not distinguish between sport fishing and commercial fishing. But the district court cited three reasons for distinguishing the two kinds of fishermen for tax purposes. First, the court pointed out that § 4161(a) is in a subchapter of the Code labeled "recreational equipment" and a part entitled "sporting goods". Second, the court believed that Congress did not intend to tax lures used in commercial fishing. And, finally, the court asserted that the Commissioner's own Regulations, 26 C.F.R. § 48.4161(a)-1, supported the non-taxation of commercial fishing equipment.

The Internal Revenue Code itself provides that nothing is to be inferred from the grouping or indexing of any particular section, 26 U.S.C. § 7806(b), and this court has held that the title of a statute cannot limit the plain meaning of its text. *Pike v. United States*, 340 F.2d 487 (9th Cir. 1965). Therefore, the fact that § 4161(a) is located in that part of the Code dealing with "recreational equipment" and "sporting goods" is of little significance.

Unlike the district court, we do not find the legislative history unambiguous. This excise tax was originally enacted in 1917 to raise revenue for World War I. 40 Stat. 300. At that time a large number of sporting goods were taxed, including croquet balls, badminton racquets, and billiard cues. In 1965, as part of the Excise Tax Reduction Act, 79 Stat. 136, Congress repealed the tax on all of these goods except for fishing equipment. The committee report states that "[t]he 10 percent manufacturers' excise tax on fishing equipment is continued because revenues equivalent to the tax on these items are distributed under the provisions of Public Law 681, 81st Congress, to aid the States in fish restoration, and management in respect of fish having a material value for sport and recreation." 1965 U.S. Code, Cong. & Adm. News 1672. While the revenues raised by the tax are clearly intended to benefit recreational fishermen, there is no reason to believe that commercial fishermen do not also benefit from conservation programs, nor to believe that Congress intended to exempt commercial fishermen from sharing the cost of these programs. The legislative history does suggest that Congress originally intended to tax sporting equipment,

but the history of the partial repeal proves nothing about a preference for commercial over sport fishermen.

The district court's theory that the Regulations support such an interpretation is based on a misunderstanding. The Regulation, § 48.4161(a)-1, does speak consistently in terms of the sport of fishing. The particular sentence quoted by the district court, however, is taken out of context.[1] The Regulation is exempting from tax those articles which are nominally fishing gear, but are actually toys or novelties and not suitable for actual fishing use.

There is no dispute that the lures here can be used, and are in fact sometimes used, for sport fishing. They are therefore sporting goods. The fact that the ultimate consumer may use the lures for commercial purposes does not change their character as sporting goods. *Cf. Commerce-Pacific, Inc. v. United States*, 278 F.2d 651, 653 (9th Cir.), *cert. denied*, 364 U.S. 872 (1960). The tax is imposed on the manufacturer or importer. In most cases the manufacturer will not know, when the tax is imposed, whether the ultimate consumer will use the goods for commercial or recreational purposes, or both. To hold that the imposition of the tax on the manufacturer depends on the character of the use by the ultimate consumer would cause great and unnecessary difficulties in tax collection. We decline to create these difficulties and we do not think that Congress intended to do so.

Reversed and remanded.

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1. The last two sentences of § 48.4161(a)-1(a) read as follows:

"• • • Furthermore, the tax applies only to those specified articles of fishing equipment that are designed or constructed for use in the sport of fishing. Accordingly, the tax does not apply to those articles which, although nominally articles that are specified in section 4161(a), are in the nature of toys or novelties that merely simulate articles of a type referred to in section 4161(a), and are not designed or constructed for practical use in the sport of fishing."

The district court quoted only the first sentence.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

NORDBY SUPPLY COMPANY,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

CIVIL No. C75-145S
Filed in the
UNITED STATES
DISTRICT COURT
Western District
of Washington
Entered Jan. 25, 1977
EDGAR SCOFIELD,
Clerk
By....., Deputy

JUDGMENT

In accordance with the Findings of Fact and Conclusions of Law contemporaneously filed, it is ordered and adjudged that the plaintiff, Nordby Supply Company recover from the defendant, United States of America, the sum of $2,714.35 plus interest as provided by law and its costs of action.

/s/ WALTER T. McGOVERN
United States District Judge

Dated at Seattle, Washington this 24th day of January, 1977.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

NORDBY SUPPLY COMPANY,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

CIVIL No. C75-145S
Filed in the
UNITED STATES
DISTRICT COURT
Western District
of Washington
Entered Jan. 25, 1977
EDGAR SCOFIELD,
Clerk
By....., Deputy

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

In this action, plaintiff, a Washington corporation, seeks to recover $3,392.94 in manufacturer's excise taxes on the sales of fishing tackle lures for the quarters ended June 30, 1969 through March 31, 1971. It is plaintiff's contention that it is not subject to the manufacturer's excise tax imposed on the sales of its imported artificial fishing lures by Section 4161 of the Internal Revenue Code of 1954.

FINDINGS OF FACT

1. The plaintiff, Nordby Supply Company, is engaged in the business of importing various items of fishing tackle including artificial lures which are the subject of this action. The lures are sold under the trade name "Husky."

2. The plaintiff's lures are sold in packages of ten, without hooks, and with the plaintiff's name on the package. Each package is designated "(DESIGNED AND SOLD FOR

COMMERCIAL FISHING ONLY)" or a statement to the same effect.

3. Other than listing the lures in question in the Nordby commercial trolling catalog,** no tangible item is known which would isolate the "Husky" brand lures from sport or recreational fishing usage.

4. The lures were sold wholesale by Nordby to dealers who in turn sold the lures primarily to commercial fishermen. Nordby does not make direct sales as a general rule and with respect to this suit does not claim that any direct sales were in fact made.

5. In order to determine the percentage of its lures which were sold to commercial fishermen, Nordby sent questionnaires to its largest customers. Those customers which responded to the questionnaire estimated that between 90 and 100 percent of the lures in question were sold to commercial fishermen.

6. For purposes of this action only, the parties stipulate that 80 percent of the lures in question were purchased by commercial fishermen and the remaining 20 percent were purchased by sport or recreational fishermen.

7. The plaintiff did not include the manufacturer's excise tax in the price of the lures which it sold to its dealers nor was the tax collected from the ultimate purchasers of the lures.

8. There is no factual dispute with respect to the number of lures sold by the plaintiff to its dealers.

**for No. 3 above (and the packaging without hooks and in larger quantities, and the marketing to commercial distributors only, the lures are identical in makeup and appearance to recreational and sport fishing lures,)

CONCLUSIONS OF LAW

1. The imposition of the manufacturer's excise tax pursuant to Section 4161(a) of the Internal Revenue Code of 1954 on the commercial artificial fishing lures of the

plaintiff is improper with respect to those lures which were sold to commercial fishermen.

2. The portion of the plaintiff's artificial fishing lures which were sold to non-commercial fishermen are subject to the imposition of the manufacturer's excise tax under Section 4161(a) of the Internal Revenue Code.

3. Plaintiff is entitled to a refund of $2,714.35 plus statutory interest which represents the amount of excise tax, interest, and penalties assessed against the plaintiff on the sales of its lures to commercial fishermen by the plaintiff's dealers.

4. Judgment should be entered in favor of the plaintiff in the amount of $2,714.35 plus statutory interest and costs as allowed by law.

Dated this 24th day of January, 1977.

/s/ WALTER T. McGOVERN
United States District Judge

Presented by:

CHARLES F. MANSFIELD
Assistant United States Attorney

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NORDBY SUPPLY COMPANY, *Plaintiff,* v. UNITED STATES OF AMERICA, *Defendant.*	CIVIL No. C75-145S Filed in the UNITED STATES DISTRICT COURT Western District of Washington April 22, 1976 EDGAR SCOFIELD, Clerk By....., Deputy ORDER DENYING MOTION TO SET ASIDE ORDER DATED JANUARY 16, 1976

THIS MATTER came on for hearing before the undersigned judge in the above-entitled court upon defendant's Motion to Set Aside the Court's Order Granting Summary Judgment in favor of plaintiff.

The Court having considered the records and files herein, including but not limited to defendant's memorandum in support of its motion and plaintiff's reply to defendant's motion, concludes that the motion for reconsideration should be denied for the reasons stated below.

The only question before the Court in the defendant's prior motion for partial summary judgment to which the Court's Order of January 16, 1976 refers, was a legal one, that is, is the excise tax established by Section 4161 of Title 26, Internal Revenue Code, applicable to artificial fishing lures designed or constructed for use in commercial fishing. The Stipulation of the parties dated January 5, 1976 sets forth the following agreement:

> 2. The lures in issue are sold in packages of ten, without hooks, and with the plaintiff's name on the package. Each package is designated "(DESIGNED AND SOLD FOR COMMERCIAL FISHING ONLY)" or a statement to the same effect.
>
> 3. These lures were sold by Nordby wholesale to dealers who, in turn, *sold the lures to commercial fishermen*. . . ." (Emphasis supplied)

There was therefore no dispute before the Court whether any of the lures in question were sold for use in sport fisheries. The only issue was whether the excise tax applies to *all* artificial lures, or "only to those specified articles of fishing equipment that are designed or constructed *for use in the sport of fishing*." (See 26 C.F.R. § 48.4161(a)-1. Emphasis supplied.) This Court held that while the language of Section 4161 is not as clear as it could have been in indicating on its face that the excise tax is applicable only to recreational or sporting fishing equipment, nevertheless, when the language is viewed in its context within the Code, and when consideration is given to supporting evidence of Congressional intent and to the Internal Revenue regulations themselves, the conclusion is inescapable that Section 4161 shall not apply to commercial fishing gear.

The defendant in its memorandum in support of its motion expresses concern over the adaption of a standard which looks to the ultimate use of the fishing equipment to determine whether the excise tax is applicable. It is clear that such an inquiry would raise practical difficulties for the government in its application of such a standard.

Yet in those instances where design or construction of fishing gear would be the same whether the gear was for commercial or sport use, the Court is forced to apply an "ultimate use" standard as a matter of necessity. This is because it would be even more harsh to require a manufacturer or importer of fishing gear used primarily for commercial fishing to pay the ten per cent federal excise tax as to all listed equipment manufactured or imported just because such equipment might be used in limited instances "in the *sport* of fishing," that is, by sport fishermen, when Section 4161 does not apply to commercial fishing

gear. *Commerce-Pacific v. United States*, 278 F.2d 651 (9th Cir. 1960) is neither controlling nor helpful in setting forth the appropriate test to be used.

Given the Stipulation of the parties referred to above, the Court need not make a determination that the "Husky" lures in question were designed or constructed primarily for use in commercial fishing (although it appears from the record that Nordby imported such lures solely for that purpose) since it is agreed that the lures were sold to dealers for commercial use only and that the dealers "sold the lures to commercial fishermen." Having found that Section 4161 does not apply to commercial fishing gear, there can be no question in the instant action as to the inapplicability of the excise tax on plaintiff's "Husky" fishing lures.

NOW THEREFORE,

IT IS HEREBY ORDERED that defendant's Motion to Set Aside the Court's Order Granting Summary Judgment in Favor of Plaintiff be and the same is DENIED for the reasons set forth above. The Court's Order of January 16, 1976 did not reach the question whether the plaintiff passed the excise tax in question on to its customers and thus is entitled to a refund of the excise taxes paid, nor does the Court reach that question here as well.

DATED this 22nd day of April, 1976.

/s/ WALTER T. McGOVERN
Chief United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NORDBY SUPPLY COMPANY, *Plaintiff,* v. UNITED STATES OF AMERICA, *Defendant.*	No. C75-145S Filed in the UNITED STATES DISTRICT COURT Western District of Washington January 19, 1976 EDGAR SCOFIELD, Clerk By....., Deputy

ORDER

THIS MATTER comes on to be heard before the undersigned Judge of the above-entitled Court upon the Motion for Summary Judgment brought by both the Defendant and the Plaintiff. Under the stipulation of the parties filed in this action on January 6, 1976, the only issue presently before the Court is a legal one, i.e., "Whether the excise tax on artificial fishing lures imposed by Section 4161(a) of the Internal Revenue Code of 1954 applies to the Husky lures sold by Nordby (Plaintiff herein) to its dealers." For the reasons set forth below, the Court finds the imposition of an excise tax under 4161(a) on commercial artificial fishing lures to be improper.

Section 4161(a), as set forth in the Internal Revenue Code, 26 USC 4161, as amended, does not expressly exempt commercial fishing lure from the imposition of the excise tax, but the title of the subchapter and part under which 4161(a) is found specifically refers to recreational equipment and sporting goods. The implication therefrom is as clear as it possibly could be that commercial gear is not covered by the section in issue.

Other evidence of the intent of Congress to assess an excise tax *only* on recreational fishing gear can be found in the legislative history of the 1965 Excise Tax Reduction Act, Public Law 89-44. Therein the House Committee on

Ways and Means states that the excise tax on fishing equipment was not being repealed (the Bill repealed the tax on the other listed sporting equipment) because revenues equivalent to the tax were being distributed to the States "to aid the States in fishing restoration, and management in respect to fish having material value for *sport and recreation*" (emphasis ours). (See House Report No. 433, *United States Code and Administrative News*, 89th Congress, 1st Session 1965, Volume 1 at pages 1671-2).

Even further evidence that the Government's imposition of 10% excise tax on Plaintiff's commercial fishing lures is unreasonable can be found in the Internal Revenue's own regulations. See particularly 26 CFR §48.4161(a)-1, where the regulation clearly sets out the proper extent and scope of the tax:

> Furthermore, the tax applies *only* to those specified articles of fishing equipment that are designed or constructed for use in the *sport* of fishing. (Emphasis ours.)

Set forth under the heading of "Sporting Goods", this regulation, while describing "types" of fishing gear covered by the tax, can only be read as delineating in its applicability between sporting and commercial gear.

So, while the language of 4161(a) may not be as clear as it could have been in limiting its application to recreational or sporting fishing equipment, viewing that section in its context within the Code, together with the Internal Revenue regulations themselves, and the supporting evidence of Congressional intent as found in the Excise Tax Reduction Act legislative history, the Court finds that Section 4161(a) does not apply to commercial fishing gear, including Plaintiff's "Husky" lures. NOW THEREFORE,

IT IS ORDERED that Defendant's Motion for Summary Judgment is DENIED, and it is further ORDERED that Summary Judgment on the issue now before the Court, as indicated above, be and the same is GRANTED in favor of the Plaintiff.

DATED this 16th day of January, 1976.

/s/ WALTER T. McGOVERN
Chief United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON AT SEATTLE

NORDBY SUPPLY COMPANY, *Plaintiff*, v. UNITED STATES OF AMERICA, *Defendant*.	CIVIL NO. C75-145S Filed in the UNITED STATES DISTRICT COURT Western District of Washington January 24, 1977 EDGAR SCOFIELD, Clerk By....., Deputy

STIPULATION

Comes now the plaintiff, Nordby Supply Company, by and through its attorney of record, Charles E. Watts of Seattle, Washington, and the defendant, United States of America, by and through its attorneys of record, Stan Pitkin, United States Attorney for the Western District of Washington and J. Clayton Berger of the Tax Division, Department of Justice, Washington, D.C., for the purposes of entering into the following stipulation of facts in conjunction with the above entitled action.

The following additional facts and amendments to the Stipulation previously filed with the Court are hereby admitted by the parties.

1. The plaintiff, Nordby Supply Company, is engaged in the business of importing various items of fishing tackle including artificial lures which are the subject of this action. The lures are sold under the trade name "Husky."

2. The plaintiff's lures are sold in packages of ten, without hooks, and with the plaintiff's name on the package. Each package is designed "(DESIGNED AND SOLD FOR COMMERCIAL FISHING ONLY)" or a statement to that same effect.

3. Other than listing the lures in question in the Nordby commercial trolling catalog, and the packaging without hooks and in larger quantities, and the marketing to commercial distributors only, the lures are identical in makeup and appearance to recreational and sport fishing lures, no tangible item is known which would isolate the "Husky" brand lures from sport or recreational fishing usage.

4. The lures were sold wholesale by Nordby to dealers who in turn sold the lures primarily to commercial fisherman. Nordby does not make direct sales as a general rule and with respect to this suit does not claim that any direct sales were in fact made.

5. In order to determine the percentage of its lures which were sold to commercial fisherman, Nordby sent questionnaires to its largest customers. Those customers which responded to the questionnaire estimated that between 90 and 100 percent of the lures in question were sold to commercial fishermen.

6. For purposes of this action only, the parties stipulate that 80 percent of the lures in question were purchased by commercial fishermen and the remaining 20 percent were purchased by sport or recreational fishermen.

7. There is no factual dispute between the parties with respect to the number of lures sold to the dealers and the amount of manufacturer's excise tax due on those lures sold to non-commercial fishermen.

8. Defendant stipulates that there is no evidence that the plaintiff included the tax in the price of the lures which it sold to the dealers or that the tax was collected from the ultimate purchasers of the lures.

DATED this 24th day of January, 1977.

CHARLES E. WATTS
Attorney for Plaintiff

STAN PITKIN
United States Attorney

J. CLAYTON BERGER
Attorneys for Defendant

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON AT SEATTLE

NORDBY SUPPLY COMPANY, *Plaintiff,* v. UNITED STATES OF AMERICA, *Defendant.*	CIVIL NO. C75-145S Filed in the United States District Court Western District of Washington January 6, 1976 EDGAR SCOFIELD, Clerk By....., Deputy STIPULATION

COMES NOW the plaintiff, by and through its attorney of record, Charles E. Watts, Seattle, Washington, and the defendant, United States of America, by and through its attorney of record, J. Clayton Berger, Washington, D.C., for the purpose of entering into the following stipulation in conjunction with the defendant's motion for summary judgment.

The following facts are admitted by the parties:

1. The plaintiff, Nordby Supply Company, is engaged in the business of importing various items of fishing equipment including plastic fishing lures which are the subject of this action. The lures are sold by Nordby under the trade name "Husky."

2. The lures in issue are sold in packages of ten, without hooks, and with the plaintiff's name on the package. Each package is designated "(DESIGNED AND SOLD FOR COMMERCIAL FISHING ONLY)" or a statement to the same effect.

3. These lures were sold by Nordby wholesale to dealers who, in turn, sold the lures to commercial fishermen. Nordby does not make direct sales as a general rule, and

for purposes of this action, Nordby does not claim any direct sales were, in fact, made.

4. There is no factual dispute with respect to the number of lures sold to dealers and the amount of manufacturer's excise tax due if Section 4161 of the Internal Revenue Code of 1954 is applicable to the plaintiff's sales to dealers of the lures in issue.

5. The only issue of material fact is whether the plaintiff passed on the excise tax which is the subject matter of this action to the dealer who purchased its lures. The foregoing factual issue is not material to defendant's motion for summary judgment and will only be reached by the Court if it determines that the fishing lures involved were not subject to the excise tax imposed by Section 4161(a).

6. The only issue to be determined by the Court for the purpose of defendant's motion for summary judgment is an issue of law, to wit: Whether the excise tax on artificial fishing lures imposed by Section 4161(a) of the Internal Revenue Code of 1954 applies to the Husky lures sold by Nordby to its dealers.

Dated this 5th day of January, 1976.

CHARLES E. WATTS
Attorney for Plaintiff

STAN PITKIN
United States Attorney

J. CLAYTON BERGER
Attorneys for Defendant

PRIOR LEGISLATION

APPENDIX H

Part V—New Excise Taxes

SEC. 551. NEW MANUFACTURERS' EXCISE TAXES.

Subchapter A of Chapter 29 of the Internal Revenue Code is amended by inserting after section 3405 the following new section:

"SEC. 3406. EXCISE TAXES IMPOSED BY THE REVENUE ACT OF 1941.

"(a) IMPOSITION.—There shall be imposed on the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to the rate, on the price for which sold, set forth in the following paragraphs (including in each case parts or accessories of such articles sold on or in connection therewith, or with the sale thereof):

"(1) SPORTING GOODS.—Badminton nets; badminton rackets (measuring 22 inches over-all or more in length); badminton racket frames (measuring 22 inches over-all or more in length); badminton racket string; badminton shuttlecocks, badminton standards; baseballs; baseball bats (measuring 26 inches or more in length); baseball body protectors and shin guards; baseball gloves and mitts; baseball masks; basketballs; billiard and pool tables (measuring 45 inches over-all or more in length); billiard and pool balls and cues for such tables; bowling balls and pins; boxing gloves, masks, head guards, and ear guards; clay pigeons; cricket balls; cricket bats; croquet balls and mallets; curling stones; deck tennis rings, nets, and posts; fencing equipment; *fishing rods, creels, reels, and artificial lures, baits, and flies;* footballs; football harness; football helmets; golf bags (measuring 26 inches or more in length); golf balls; golf clubs (measuring 30 inches or more in length); gymnasium equipment and apparatus; hockey balls; hockey pucks; hockey sticks (measuring 30 inches or more in length); indoor baseballs; indoor baseball bats (measuring 26

inches or more in length); indoor baseball gloves and mitts; lacrosse balls; lacrosse sticks; mass balls; polo balls; polo mallets; push balls; skates; skis; ski poles; snow shoes; snow toboggans and sleds; soccer balls; softball balls; softball bats (measuring 26 inches or more in length); softball gloves and mitts; squash balls; squash rackets (measuring 22 inches over-all or more in length); squash racket frames (measuring 22 inches over-all or more in length); squash racket string; tennis balls; table tennis tables; balls, nets, and paddles; tennis nets; tennis rackets (measuring 22 inches over-all or more in length); tennis racket frames (measuring 22 inches over-all or more in length); tennis racket string; track hurdles; traps for throwing clay pigeons; vaulting poles, cross bars, and standards; volley balls, nets, and standards; water polo balls and goals; and wrestling head harness; 10 per centum.

"(c) EFFECTIVE DATE.—This section shall take effect on October 1, 1941." 55 Stat. 716 (emphasis added).

APPENDIX I

Subchapter D—Recreational Equipment

PART I—SPORTING GOODS

SEC. 4161. IMPOSITION OF TAX.

"There is hereby imposed upon the sale by the manufacturer, producer, or importer of the following articles (including in each case parts or accessories of such articles sold on or in connection therewith, or with the sale thereof) a tax equivalent to 10 percent of the price for which so sold:

Badminton nets, rackets and racket frames (measuring 22 inches overall or more in length), racket string, shuttlecocks, and standards.

Billiard and pool tables (measuring 45 inches overall or more in length) and balls and cues for such tables.

Bowling balls and pins.

Clay pigeons and traps for throwing clay pigeons.

Cricket balls and bats.

Croquet balls and mallets.

Curling stones.

Deck tennis rings, nets and posts.

Fishing rods, creels, reels and artificial lures, baits and flies.

Golf bags (measuring 26 inches or more in length), balls and clubs (measuring 30 inches or more in length).

Lacrosse balls and sticks.

Polo balls and mallets.

Skis, ski poles, snowshoes, and snow toboggans and sleds (measuring more than 60 inches overall in length)..

Squash balls, rackets and racket frames (measuring 22 inches overall or more in length), and racket string.

Table tennis tables, balls, nets and paddles.

Tennis balls, nets, rackets and racket frames (measuring 22 inches overall or more in length) and racket string." 68A Stat. 489 (emphasis added).

APPENDIX J

SEC. 205. RECREATIONAL EQUIPMENT.

(a) SPORTING GOODS.—Section 4161 (relating to sporting goods) is amended to read as follows:

"SEC. 4161. IMPOSITION OF TAX.

"There is hereby imposed upon the sale of fishing rods, creels, reels, and artificial lures, baits, and flies (including parts or accessories of such articles sold on or in connection therewith, or with the sale thereof) by the manufacturer, producer, or importer a tax equivalent to 10 percent of the price for which so sold." 79 Stat. 140.

APPENDIX K

Subchapter D—Recreational Equipment

PART I—SPORTING GOODS

SEC. 4161. IMPOSITION OF TAX.

"(a) RODS, CREELS, ETC.—Thereis hereby imposed upon the sale of fishing rods, creels, reels, and artificial lures, baits, and flies (including parts or accessories of such articles sold on or in connection therewith, or with the sale thereof) by the manufacturer, producer, or importer a tax equivalent to 10 percent of the price for which so sold.

(b) BOWS AND ARROWS, ETC.—

(1) BOWS AND ARROWS.— There is hereby imposed upon the sale by the manufacturer, producer, or importer—

(A) of any bow which has a draw weight of 10 pounds or more, and

(B) of any arrow which measures 18 inches overall or more in length, a tax equivalent to 11 percent of the price for which so sold.

(2) PARTS AND ACCESSORIES.—There is hereby imposed upon the sale by the manufacturer, producer, or importer—

(A) of any part or accessory (other than a fishing reel) suitable for inclusion in or attachment to a bow or arrow described in paragraph (1), and

(B) of any quiver suitable for use with arrows described in paragraph (1), a tax equivalent to 11 percent of the price for which so sold." 86 Stat. 1173.